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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

8 Pete Carl Rogovich,

9 Petitioner,

10 vs.

11 Dora B. Schriro, et al.,<sup>1</sup>

12 Respondents.

) No. CV-00-1896-PHX-ROS

) DEATH PENALTY CASE

) **ORDER RE: PROCEDURAL STATUS**  
 ) **OF CLAIMS**

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15 Petitioner Pete Carl Rogovich, a state prisoner sentenced to death, petitions this Court

16 for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he was convicted and

17 sentenced in violation of the United States Constitution. This Order addresses procedural bar

18 and other issues raised by Respondents' answer to the petition.

19 **BACKGROUND**

20 On June 1, 1994, Petitioner was convicted by a jury of four counts of first-degree

21 murder, two counts of aggravated assault, two counts of armed robbery, and one count of

22 unlawful flight from a law enforcement vehicle. Petitioner was sentenced to death for the

23 murders and to a term of years for the other offenses. Petitioner's convictions and sentences

24 were affirmed on direct appeal. State v. Rogovich, 188 Ariz. 38, 932 P.2d 794 (1997).

25 On May 3, 1999, Petitioner filed a petition for post-conviction relief ("PCR") pursuant

26 to Rule 32 of the Arizona Rules of Criminal Procedure. (Dkt. 60, Ex. B.) On September 29,

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28 <sup>1</sup> Dora B. Schriro is substituted for her predecessor, Terry Stewart, as Director, Arizona Department of Corrections. Fed. R. Civ. P. 25(d)(1).

1 1999, the court summarily denied relief without an evidentiary hearing. (Dkt. 60, Ex. E.)  
 2 The Arizona Supreme Court summarily denied a petition for review (“PR”) from the denial  
 3 of PCR relief. (Dkt. 60, Exs. F, I.) Petitioner commenced this action on October 5, 2000,  
 4 and the parties briefed the procedural status of Petitioner’s claims. (Dkts. 55, 60, 66, 70, 71.)

5 Shortly after the parties completed briefing on the procedural status of Petitioner’s  
 6 claims, the Supreme Court decided Ring v. Arizona, 536 U.S. 584 (2002), which found  
 7 Arizona’s death penalty sentencing scheme unconstitutional because judges, not juries,  
 8 determined the existence of the aggravating circumstances necessary to impose a death  
 9 sentence. The Court stayed Petitioner’s sentencing-related claims pending a determination  
 10 of whether Ring applies retroactively to cases on collateral review (Dkt. 78) and, in the  
 11 interest of judicial economy, deferred ruling on the procedural status of all the claims. The  
 12 stay was lifted after the U.S. Supreme Court resolved that Ring does not apply retroactively,  
 13 Schriro v. Summerlin, 542 U.S. 348 (2004). (Dkt. 142.)

#### 14 **PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT**

15 Because this case was filed after April 24, 1996, it is governed by the Antiterrorism and  
 16 Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Lindh v. Murphy, 521  
 17 U.S. 320, 336 (1997); Woodford v. Garceau, 538 U.S. 202, 210 (2003). The AEDPA  
 18 requires that a writ of habeas corpus not be granted unless it appears that the petitioner has  
 19 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); see also Coleman v.  
 20 Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509 (1982). To properly  
 21 exhaust state remedies, the petitioner must “fairly present” his claims to the state’s highest  
 22 court in a procedurally appropriate manner. O’Sullivan v. Boerckel, 526 U.S. 838, 848  
 23 (1999).

24 A claim is “fairly presented” if the petitioner has described the operative facts and the  
 25 federal legal theory on which his claim is based so that the state courts have a fair  
 26 opportunity to apply controlling legal principles to the facts bearing upon his constitutional  
 27 claim. Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard v. Connor, 404 U.S. 270, 277-78  
 28

(1971).<sup>2</sup> Commenting on the importance of fair presentation, the United States Supreme Court has stated:

If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam). Following Duncan, the Ninth Circuit Court of Appeals has held that a state prisoner has not "fairly presented" (and thus exhausted) federal claims in state court unless he specifically indicated to that court that the claims were based on federal law. See, e.g., Lyons v. Crawford, 232 F.3d 666, 669-70 (2000), as amended by 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence, right to be tried by impartial jury and ineffective assistance of counsel lacked the specificity and explicitness required to present federal claim); Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000) (broad reference to "due process" insufficient to present federal claim); see also Hiivala, 195 F.3d at 1106 ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion."). A petitioner must make the federal basis of a claim explicit by citing specific provisions of federal statutory or case law, even if the federal basis of a claim is "self-evident," Gatlin v. Madding, 189 F.3d 882, 888 (9th Cir. 1999), or by citing state cases that explicitly analyze the same federal constitutional claim, Peterson v. Lampert, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). Such explicit fair presentation must be made not only to the trial or post-conviction court, but to the state's highest court. Baldwin v. Reese, 541 U.S. 27, 32 (2004). If a petitioner's habeas claim includes new factual allegations not presented to the state court, the claim may be considered unexhausted if the new facts "fundamentally alter" the legal claim presented and considered in state court. Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

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<sup>2</sup> Resolving whether a petitioner has fairly presented his claim to the state court is an intrinsically federal issue to be determined by the federal court. Wylde v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

1 A habeas petitioner's claims may be precluded from federal review in either of two  
 2 ways. First, a claim may be procedurally defaulted in federal court if it was actually raised  
 3 in state court but found by that court to be defaulted on state procedural grounds. Coleman,  
 4 501 U.S. at 729-30. Second, a claim may be procedurally defaulted if the petitioner failed  
 5 to present the claim in any forum and "the court to which the petitioner would be required  
 6 to present his claims in order to meet the exhaustion requirement would now find the claims  
 7 procedurally barred." Coleman, 501 U.S. at 735 n.1. This is often referred to as "technical"  
 8 exhaustion because although the claim was not actually exhausted in state court, the  
 9 petitioner no longer has an available state remedy. See id. at 732 ("A habeas petitioner who  
 10 has defaulted his federal claims in state court meets the technical requirements for  
 11 exhaustion; there are no remedies any longer 'available' to him."); Gray v. Netherland, 518  
 12 U.S. 152, 161-62 (1996).

13 Rule 32 of the Arizona Rules of Criminal Procedure governs when petitioners may seek  
 14 relief in post-conviction proceedings and raise federal constitutional challenges to their  
 15 convictions or sentences in state court. Rule 32.2 provides, in part:

16 a. Preclusion. A defendant shall be precluded from relief under this rule  
 17 based upon any ground:

18 . . . .

19 (2) Finally adjudicated on the merits on appeal or in any previous collateral  
 20 proceeding;

21 (3) *That has been waived at trial, on appeal, or in any previous collateral*  
 22 *proceeding.*

23 b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on  
 24 Rules 32.1(d), (e), (f), (g) and (h). When a claim under [these sub-sections] is to  
 25 be raised in a successive or untimely post-conviction relief proceeding, the notice  
 26 of post-conviction relief must set forth the substance of the specific exception and  
 27 the reasons for not raising the claim in the previous petition or in a timely manner.  
 28 If the specific exception and meritorious reasons do not appear substantiating the  
 claim and indicating why the claim was not stated in the previous petition or in a  
 timely manner, the notice shall be summarily dismissed.

Ariz. R. Crim. P. 32.2 (West 2003) (emphasis added). Thus, pursuant to Rule 32.2(a)(3),  
 petitioners may not be granted relief on any claim which was waived at trial, on appeal, or  
 in a previous PCR petition. Similarly, pursuant to Rule 32.4, petitioners must seek relief in

1 a timely manner. Only if a claim falls within certain exceptions (subsections (d) through (h)  
2 of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition  
3 or was not presented in a timely manner will the preclusive effect of Rule 32.2 be avoided.  
4 Ariz. R. Crim. P. 32.2(a) (3), 32.4(a).

5 Therefore, in the present case, if there are claims which have not been raised previously  
6 in state court, the Court must determine whether Petitioner has state remedies currently  
7 available to him pursuant to Rule 32. If no remedies are currently available, petitioner's  
8 claims are "technically" exhausted but procedurally defaulted. Coleman, 501 U.S. at 732,  
9 735 n.1. In addition, if there are claims that were fairly presented in state court but found  
10 defaulted on state procedural grounds, such claims also will be found procedurally defaulted  
11 in federal court so long as the state procedural bar was independent of federal law and  
12 adequate to warrant preclusion of federal review. Harris v. Reed, 489 U.S. 255, 262 (1989).  
13 A state procedural default is not independent if, for example, it depends upon an antecedent  
14 federal constitutional ruling. See Stewart v. Smith, 536 U.S. 856 (2002) (per curiam). A  
15 state bar is not adequate unless it was firmly established and regularly followed at the time  
16 of application by the state court. Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

17 Because the doctrine of procedural default is based on comity, not jurisdiction, federal  
18 courts retain the power to consider the merits of procedurally defaulted claims. Reed v.  
19 Ross, 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of  
20 procedurally defaulted claims unless a petitioner demonstrates legitimate cause for the failure  
21 to properly exhaust in state court and prejudice from the alleged constitutional violation, or  
22 shows that a fundamental miscarriage of justice would result if the claim were not heard on  
23 the merits in federal court. Coleman, 501 U.S. at 735 n.1.

24 Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some  
25 objective factor external to the defense impeded counsel's efforts to comply with the State's  
26 procedural rule." Id. at 753. Objective factors which constitute cause include interference  
27 by officials which makes compliance with the state's procedural rule impracticable, a  
28 showing that the factual or legal basis for a claim was not reasonably available to counsel,

1 and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488  
 2 (1986). “Prejudice” is actual harm resulting from the alleged constitutional error or violation.  
 3 Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice resulting  
 4 from a procedural default, a habeas petitioner bears the burden of showing not merely that  
 5 the errors at his trial constituted a possibility of prejudice, but that they worked to his actual  
 6 and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.  
 7 United States v. Frady, 456 U.S. 152, 170 (1982).

### 8 **DISCUSSION**

9 Petitioner alleges eleven claims in the Amended Petition. Respondents concede that  
 10 Claims 5 and 6 were properly exhausted in state court as to the Sixth, Eighth and Fourteenth  
 11 Amendments (Dkts. 60 at 11; 70 at 11); therefore, those claims will be briefed and reviewed  
 12 on the merits. Respondents contend that the remaining claims are procedurally defaulted, in  
 13 whole or in part, and they are reviewed below. The Court first addresses some general issues  
 14 relevant to numerous claims.

#### 15 **Fifth Amendment Due Process Allegations**

16 With respect to each claim, Petitioner alleges a violation of the Fifth Amendment Due  
 17 Process Clause. It is the Fourteenth Amendment, not the Fifth that protects a person against  
 18 deprivations of due process by a state. See U.S. Const. amend. XIV, § 1 (“nor shall any state  
 19 deprive any person of life, liberty, or property without due process of law”); Castillo v.  
 20 McFadden, 399 F.3d 993, 1002 n.5 (9th Cir. 2005) (“The Fifth Amendment prohibits the  
 21 federal government from depriving persons of due process, while the Fourteenth Amendment  
 22 explicitly prohibits deprivations without due process by the several States.”). Because the  
 23 Fifth Amendment Due Process Clause does not provide a cognizable ground for relief from  
 24 Petitioner’s state court conviction, the allegations that the Fifth Amendment Due Process  
 25 Clause was violated are dismissed as to each claim and will not be discussed further herein.

#### 26 **Eighth Amendment Allegations**

27 With respect to each claim, Petitioner alleges a violation of the Eighth Amendment  
 28 prohibition on cruel and unusual punishment. The right to be free from cruel and unusual

1 punishment, by definition, is a protection related to the imposition or carrying out of a  
2 sentence. That is, Eighth Amendment protections do not attach until a person is convicted  
3 and subject to punishment by the State. See Ingraham v. Wright, 430 U.S. 651, 664, 667,  
4 671 n. 40 (1977) (summarizing that the Eighth Amendment circumscribes only the type of  
5 punishment imposable on those convicted, punishment grossly disproportionate to the crime  
6 and what can be criminalized and punished); Bell v. Wolfish, 441 U.S. 520, 536 n.16 (1979)  
7 (noting that the Eighth Amendment has no application to pretrial detainees). Contrary to  
8 Petitioner's conclusory and unsupported assertion (see Dkt. 66 at 16), there is no cognizable  
9 claim that Petitioner's rights under the Eighth Amendment were violated as to claims relating  
10 solely to his conviction. Because the Eighth Amendment does not provide a cognizable  
11 ground for relief regarding conviction-related claims, the allegations that the Eighth  
12 Amendment was violated are dismissed as to Claims 1 through 4, 9, and 10, and will not be  
13 further discussed herein.

#### 14 **Statutory Fundamental Error Review**

15 Petitioner asserts that certain claims or portions thereof were exhausted by virtue of the  
16 Arizona Supreme Court's fundamental error review on direct appeal (Dkt. 66 at 3-6, 14).  
17 The Court disagrees.

18 Former A.R.S. § 13-4035 required Arizona appellate courts to independently review the  
19 record in all criminal cases for fundamental error. See A.R.S. § 13-4035 (Repealed by Laws  
20 1995, Ch. 198, § 1). Effective July 13, 1995, statutory fundamental error review was  
21 repealed and no longer required. See State v. Smith, 184 Ariz. 456, 459, 910 P.2d 1, 4  
22 (1996). Because Petitioner's appeal was decided after the repeal, his case was not subject  
23 to statutory fundamental error review. Further, there is no indication in the supreme court's  
24 appellate opinion that it reviewed the record for fundamental error.

25 Even if such review had been conducted, the Ninth Circuit has rejected the contention  
26 that the Arizona Supreme Court's statutory fundamental error review itself exhausts claims  
27 for purposes of federal habeas review. See Moormann v. Schriro, 426 F.3d 1044, 1057 (9th  
28 Cir. 2005); Poland (Michael) v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997) (Arizona's



1 process of fundamental error review does not excuse a petitioner's failure to present federal  
2 claims to the state's highest court); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th  
3 Cir.1996) (rejecting argument that review for fundamental error by Arizona Supreme Court  
4 prevents procedural preclusion from attaching). Thus, this Court rejects Petitioner's  
5 argument that fundamental error review exhausted any claims not fairly presented to the  
6 Arizona Supreme Court, and this argument will not be discussed with respect to any  
7 individual claims.

### 8 **Claim 1**

9 Claim 1 alleges that Dr. Phillip Keen, the Maricopa County Medical Examiner, testified  
10 regarding the victims' causes of death based upon autopsy reports prepared by Dr. Larry  
11 Shaw, in violation of Petitioner's Sixth Amendment rights to counsel and to confront  
12 witnesses against him, and his Fourteenth Amendment right to due process and equal  
13 protection. Respondents argue this claim is only exhausted to the extent Petitioner alleges  
14 a violation of his confrontation rights. (Dkt. 60 at 9.) The Court agrees. Petitioner presented  
15 the factual basis for this claim on direct appeal as a violation of his Sixth and Fourteenth  
16 Amendment confrontation rights (id., Ex. A at i, 11-14), and these aspects of the claim will  
17 be briefed and reviewed on the merits.

18 In contrast, Petitioner did not allege on appeal a violation of his right to counsel, due  
19 process or equal protection. (Id.) Petitioner is now precluded by Arizona Rules of Criminal  
20 Procedure 32.2(a)(3) and 32.4 from obtaining relief in state court on the un-presented aspects  
21 of Claim 1 absent an applicable exception, which he does not assert. See Ariz. R. Crim. P.  
22 32.2(b); 32.1(d)-(h); Beaty, 303 F.3d at 987 & n.5 (finding no state court remedies and noting  
23 that petitioner did not raise any exceptions to Rule 32.2(a)). Thus, these aspects of Claim 1  
24 are technically exhausted but procedurally defaulted, absent a showing of cause and  
25 prejudice or a fundamental miscarriage of justice. Petitioner has not argued that either cause  
26 and prejudice or a fundamental miscarriage of justice excuses the default (Dkt. 66 at 14);  
27 therefore, these aspects of Claim 1 are dismissed as procedurally barred.



1           **Claim 2**

2           Claim 2 alleges that the trial court's failure to ascertain whether Petitioner's waiver of  
3 fundamental constitutional rights (implicated by presenting an insanity defense) was  
4 knowing, intelligent and voluntary, violated his Sixth Amendment right to counsel and his  
5 Fourteenth Amendment rights to due process and equal protection. Respondents concede  
6 that the Fourteenth Amendment due process aspect of the claim is exhausted, but contend the  
7 remainder of the claim is defaulted. (Dkt. 60 at 10.) The Court agrees. The Fourteenth  
8 Amendment due process portion of Claim 2 will be briefed and reviewed on the merits.

9           Petitioner contends he presented the right to counsel aspect of Claim 2 in state court by  
10 citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938), because it held that the right to counsel  
11 is fundamental; he does not dispute that the equal protection allegation has never been  
12 presented to the state court. (Dkt. 66 at 15.) On direct appeal, Petitioner alleged that the  
13 Fourteenth Amendment Due Process Clause requires consent to an insanity defense to be  
14 knowing, intelligent and voluntary because it constitutes a waiver of fundamental rights,  
15 including the presumption of innocence and proof of every element of an offense beyond a  
16 reasonable doubt; he did not assert an equal protection or right to counsel violation. (Dkt.  
17 60, Ex. A at 17-20.) Although Petitioner cited Johnson as establishing the standard to find  
18 a waiver of a fundamental right, he expressly stated that he was *not* asserting a violation of  
19 his fundamental right to counsel. (Id. at 18 ("It is true that Rogovich had his constitutional  
20 right to a jury honored, and to a lawyer, and to confrontation, and to compulsory process and  
21 to remain silent.")) Under these circumstances, Petitioner's reference to Johnson was *not*  
22 sufficient to fairly present a claim for violation of his right to counsel.

23           Petitioner is now precluded by Arizona Rules of Criminal Procedure 32.2(a)(3) and 32.4  
24 from obtaining relief in state court on the right to counsel and equal protection portions of  
25 Claim 2 absent an applicable exception, which he does not assert. See Ariz. R. Crim. P.  
26 32.2(b); 32.1(d)-(h); Beaty, 303 F.3d at 987 & n.5 (finding no state court remedies and noting  
27 that petitioner did not raise any exceptions to Rule 32.2(a)). These aspects of Claim 2 are  
28 technically exhausted but procedurally defaulted, absent a showing of cause and prejudice

1 or a fundamental miscarriage of justice. Petitioner has not alleged that cause and prejudice  
 2 or a fundamental miscarriage of justice excuses the default of these aspects of the claim (Dkt.  
 3 66 at 15-16), and they are dismissed as procedurally barred.

### 4 **Claim 3**

5 Claim 3 alleges that the State's failure to collect biological evidence from Petitioner in  
 6 the form of breath, blood or urine samples, despite knowledge of his potential intoxication  
 7 at the time of the crimes and/or his arrest, violated his rights under the Fourteenth  
 8 Amendment. (Dkt. 55 at 24-26.) The Amended Petition also contains a summary assertion  
 9 in the final sentence of Claim 3 that Petitioner's right to counsel was violated; however, there  
 10 is not a single allegation in the caption or body of the claim regarding any action or inaction  
 11 on the part of trial or appellate counsel. In the Traverse and Sur-Reply, Petitioner suggests  
 12 that Claim 3 includes an ineffective assistance of counsel ("IAC") allegation. To the extent  
 13 Claim 3 alleges IAC, the conclusory assertion in support of such a claim is insufficient for  
 14 habeas relief, and it will be dismissed. See Rule 2, Rules Governing § 2254 Cases, 28 U.S.C.  
 15 foll. § 2254 (requiring petition to state the facts in support of each claim); Jones v. Gomez,  
 16 66 F.3d 199, 204-05 (9th Cir. 1995); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

17 Respondents contend Claim 3 is procedurally defaulted because the PCR court found  
 18 it precluded and the supreme court summarily affirmed.<sup>3</sup> (Dkt. 60 at 10.) Petitioner asserts  
 19 the PCR court necessarily reached the merits of this claim in resolving his allegations that  
 20 trial and appellate counsel rendered ineffective assistance of counsel ("IAC") in failing to  
 21 raise and preserve the issue. (Dkt. 66 at 18-19.) The Court disagrees.

22 Claim 3 was presented in Petitioner's PCR petition, and the PCR court found it  
 23 precluded pursuant to Rule 32.2(a)(3). (Dkt. 60, Ex. E at 1-2.) In his PR to the Arizona  
 24 Supreme Court, Petitioner did not seek relief from, or review of, the PCR court's preclusion  
 25 determination; rather, he *conceded* preclusion of the substantive issue. (Id., Ex. F at 7.)

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 28 <sup>3</sup> Respondents address Claim 3 as alleging only a due process violation, presumably  
 because no factual allegations in support of an IAC claim were included in the petition.

1 Although Petitioner addressed the merits of the claim in briefing the merits of the associated  
 2 IAC claims, the legal basis for this claim is fundamentally different than an IAC claim;  
 3 therefore, he did not thereby fairly present Claim 3 as an independent claim to the supreme  
 4 court. See Anderson, 459 U.S. at 6 (fair presentation requires a description of the federal  
 5 legal theory on which a claim is based).

6 Petitioner is now precluded by Arizona Rules of Criminal Procedure 32.2(a)(3) and 32.4  
 7 from obtaining relief in state court on Claim 3. See Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h);  
 8 Beaty, 303 F.3d at 987 & n.5 (finding no state court remedies and noting that petitioner did  
 9 not raise any exceptions to Rule 32.2(a)). Further, even if the Court were to construe the PR  
 10 as having fairly presented Claim 3, this Court “looks through” the supreme court’s summary  
 11 denial and relies on the PCR court’s preclusion ruling as the last reasoned state court ruling.  
 12 See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). Contrary to Petitioner’s assertion, Rule  
 13 32.2(a)(3) is an adequate and independent state procedural bar.<sup>4</sup> Thus, Claim 3 is technically  
 14 exhausted but procedurally defaulted, absent a showing of cause and prejudice or a  
 15 fundamental miscarriage of justice.

16 Petitioner asserts that appellate IAC establishes cause to overcome the procedural  
 17 default of Claim 3. (Dkt. 66 at 19.) The appellate IAC allegation is exhausted and, if  
 18 meritorious, could establish cause for the defaulted portion of the claim. Cf. Murray, 477  
 19 U.S. at 489-90 (requiring that an IAC claim be exhausted to qualify as cause for default).  
 20 Therefore, Petitioner shall address the merits of Claim 3 as well as the merits of his cause and  
 21 prejudice argument in his merits briefing.<sup>5</sup>

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23 <sup>4</sup> Petitioner argues that Rule 32.2(a)(3) is not independent of federal law and cannot  
 24 bar federal review, as was decided by the Ninth Circuit in Smith v. Stewart, 241 F.3d 1191  
 25 (9th Cir. 2001). (Dkt. 66 at 16-17.) Since Petitioner filed his briefs, the Supreme Court  
 26 reversed the Ninth Circuit’s opinion in Smith, and held that a Rule 32.2(a)(3) preclusion  
 27 ruling is independent of federal law and can bar federal review. Stewart v. Smith, 536 U.S.  
 28 856, 860 (2002) (per curiam).

<sup>5</sup> The Court notes that the issues in Claim 3 were not raised at trial; therefore, if raised  
 on appeal they would have been reviewed solely for fundamental error. See State v.

1           **Claim 4**

2           Claim 4 alleges that Petitioner's Sixth Amendment confrontation and counsel rights and  
3 his Fourteenth Amendment due process and equal protection rights were violated by:  
4 (A) denial of the opportunity to confront witnesses regarding the aggravated assault counts;  
5 (B) insufficient evidence to support the aggravated assault convictions; and (C) trial and  
6 appellate counsel's failure to raise and preserve issues A and B. Respondents concede that  
7 subpart C was properly exhausted as a Sixth Amendment violation, and that portion of the  
8 claim will be briefed and reviewed on the merits.

9           Respondents argue that subparts A and B were found precluded by the PCR court and  
10 are, therefore, procedurally barred. (Dkt. 60 at 10.) Petitioner counters that in resolving the  
11 merits of subpart C, the PCR court necessarily reached the merits of subparts A and B. (Dkt.  
12 66 at 23.) The Court disagrees. Petitioner presented subparts A and B in his PCR petition,  
13 but the PCR court found them precluded pursuant to Rule 32.2(a)(3). (Dkt. 60, Exs. B at 18-  
14 32, E at 1-2.) In his PR, Petitioner did not seek relief from, or review of, the PCR court's  
15 preclusion determination; rather, he *conceded* preclusion of subparts A and B. (Dkt. 60, Ex.  
16 F at 7.) Although Petitioner addressed the merits of subparts A and B in an attempt to  
17 establish that the PCR court erred in denying relief on the associated IAC claims (subpart C),  
18 the legal basis for these subparts is fundamentally different than an IAC claim; therefore, he  
19 did not thereby fairly present subparts A and B as independent claims to the supreme court.  
20 See Anderson, 459 U.S. at 6 (fair presentation requires a description of the federal legal  
21 theory on which a claim is based).

22           Petitioner is now precluded by Arizona Rules of Criminal Procedure 32.2(a)(3) and 32.4  
23 from obtaining relief in state court on subparts A and B. See Ariz. R. Crim. P. 32.2(b);  
24 32.1(d)-(h); Beaty, 303 F.3d at 987 & n.5 (finding no state court remedies and noting that  
25 petitioner did not raise any exceptions to Rule 32.2(a)). Further, even if the Court were to

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Martinez, 210 Ariz. 578, 580 n.2, 115 P.3d 618, 620 n.2 (2005). Petitioner should address  
that standard in his prejudice analysis.

1 construe the PR as having fairly presented subparts A and B, this Court “looks through” the  
2 supreme court’s summary denial and relies on the PCR court’s preclusion ruling as the last  
3 reasoned state court ruling. See Ylst, 501 U.S. at 803. Thus, these subparts are technically  
4 exhausted but procedurally defaulted, absent a showing of cause and prejudice or a  
5 fundamental miscarriage of justice.

6 Petitioner argues that appellate IAC establishes cause to excuse the procedural default  
7 of subparts A and B. (Dkt. 66 at 23-24.) The appellate IAC allegation (subpart C) is  
8 exhausted and, if found to have merit, could establish cause for the defaulted portions of this  
9 claim. The Court will defer determining whether appellate IAC establishes cause to excuse  
10 the procedural default of subparts A and B; Petitioner shall address the merits of the entirety  
11 of Claim 4 as well as his cause and prejudice argument in his merits briefing.

#### 12 **Claim 7**

13 Claim 7 alleges two distinct claims each with subparts. In subclaim A, Petitioner  
14 alleges that his constitutional rights were violated by the following aspects of Arizona’s  
15 death penalty scheme: (1) the execution method inflicts unnecessary and wonton pain; (2)  
16 the scheme is mandatory in nature; (3) the absence of proportionality review; (4) the absence  
17 of a requirement that aggravating circumstances be proven to outweigh mitigating factors  
18 beyond a reasonable doubt; and (5) the failure to provide for jury sentencing at the time of  
19 Petitioner’s trial. Subclaim B alleges that Petitioner’s appellate counsel was ineffective for  
20 failing to raise and preserve issues (1) through (5).

21 Regardless of exhaustion, the Court will dismiss the entirety of Claim 7, with the  
22 exception of subclaim A(1), as meritless. See 28 U.S.C. § 2254(b)(2) (allowing denial of  
23 unexhausted claims on the merits); Rhines v. Weber, 125 S. Ct. 1528, 1535 (2005) (holding  
24 that a stay is inappropriate in federal court to allow claims to be raised in state court if they  
25 are subject to dismissal under (b)(2) as “plainly meritless”).

#### 26 Subclaims A(2) - A(5)

27 Subclaims A(2) through A(5) are dismissed on the merits for the reasons set forth  
28 below.

1        *Subclaim A(2)*

2        Petitioner alleges that Arizona's procedure is unconstitutional because the defendant  
3 is required to prove mitigation and there is a presumption in favor of death whenever any  
4 aggravator is found to exist. The Supreme Court has squarely rejected both of these  
5 challenges to Arizona's capital sentencing scheme. See Walton v. Arizona, 497 U.S. 639,  
6 650-52 (1990), overturned on other grounds by Ring v. Arizona, 536 U.S. 584 (2002).

7        *Subclaim A(3)*

8        Petitioner argues there is no method in Arizona for determining if a death sentence has  
9 been imposed arbitrarily and capriciously. In particular, Arizona has no proportionality  
10 review.

11        When the aggravating factors furnish sufficient guidance to the sentencer, courts may  
12 presume the sentence was not "wantonly and freakishly" imposed and is not disproportionate  
13 in a way precluded by the Eighth Amendment. Lewis v. Jeffers, 497 U.S. 764, 779 (1990);  
14 Gregg v. Georgia, 428 U.S. 153, 195 (1976) (finding that risk of arbitrary and capricious  
15 sentence is reduced by use of specified aggravating circumstances and the safeguard of  
16 meaningful appellate review). Petitioner is not alleging a facial challenge to the aggravating  
17 factors applied in his case – F(1), F(2) and F(8) – and there are no opinions finding those  
18 factors unconstitutional. Further, there is no federal right to proportionality review where  
19 state law does not provide for such review. Pulley v. Harris, 465 U.S. 37, 43-44, 50-51  
20 (1984). In State v. Salazar, 173 Ariz. 399, 416-17, 844 P.2d 566, 583-84 (1992) (in banc),  
21 the Arizona Supreme Court held that proportionality reviews would no longer be conducted  
22 in death penalty cases. At the time of Petitioner's direct appeal, he did not possess a  
23 constitutional right to a proportionality review.

24        *Subclaim A(4)*

25        Petitioner alleges that the death penalty system in Arizona is unconstitutional because  
26 the State is not required to prove that the aggravating factor(s) outweigh the mitigation  
27 beyond a reasonable doubt. The constitution does not require such an allocation of the  
28 burden of proof as long as the State is required to prove aggravating factors beyond a

1 reasonable doubt and the sentencer is allowed to consider and give effect to all mitigating  
2 evidence. See Walton v. Arizona, 497 U.S. at 649-50 (upholding Arizona's burden of proof  
3 for capital sentencing); cf. Blystone v. Penn., 494 U.S. 299, 305 (1990). Petitioner does not,  
4 and could not, allege that Arizona's system does not satisfy those standards.

5 *Subclaim A(5)*

6 Petitioner alleges he was denied his right to trial by jury on all the elements of the  
7 offense of capital murder, specifically the aggravating factors required for a death sentence.  
8 In Ring, 536 U.S. at 609, the Supreme Court held that Arizona's aggravating factors are an  
9 element of the offense of capital murder and must be found by a jury. However, in  
10 Summerlin, 542 U.S. at 358, the Court held that Ring does not apply retroactively to cases  
11 already final on direct review. Because Petitioner's direct review was final prior to Ring, he  
12 is not entitled to relief premised on that ruling.

13 Subclaim B

14 Subclaim B alleges that Petitioner's appellate counsel was ineffective for failing to raise  
15 issues 1 through 5. To obtain relief based on IAC, Petitioner must show that his counsel's  
16 performance was deficient and that the deficient performance caused him prejudice.  
17 Strickland v. Washington, 466 U.S. 668, 687 (1984); Evitts, 469 U.S. at 396 (recognizing the  
18 right to effective assistance of counsel for a first appeal as of right). The performance inquiry  
19 is whether counsel's assistance was reasonable considering all the circumstances. Id. at 688-  
20 89. To establish prejudice, a petitioner must show that there is a "reasonable probability"  
21 that, absent counsel's errors, the result of the appeal would have been different. Id. at 694.

22  
23 It does not constitute ineffective assistance of counsel when counsel does not raise a  
24 claim on appeal that lacks merit and for which there is not a reasonable probability that the  
25 outcome of the appeal would have been different. See Wildman v. Johnson, 261 F.3d 832,  
26 840 (9th Cir. 2001) (finding appellate counsel's failure to raise an issue cannot constitute  
27 ineffective assistance if the issue did not provide grounds for reversal); Boag v. Raines, 769  
28 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute



1 ineffective assistance); cf. U.S. v. Moore, 921 F.2d 207, 210 (9th Cir. 1990) (finding no  
2 deficient performance when counsel does not raise a claim without merit). As addressed  
3 above, issues 2 through 5 are without merit; therefore, counsel's failure to raise subclaims  
4 A(2)-(5) was not ineffective.

5 Subclaim A(1) alleges that the death penalty generally, and lethal injection and lethal  
6 gas specifically, constitute cruel and unusual punishment. At the time of Petitioner's appeal,  
7 the Arizona Supreme Court had already held that neither lethal gas nor lethal injection  
8 constituted cruel and unusual punishment. State v. Hinchey, 181 Ariz. 307, 315, 890 P.2d  
9 602, 610 (1995) (addressing lethal injection); State v. Gonzales, 181 Ariz. 502, 507, 892 P.2d  
10 838, 843 (1995) (addressing lethal gas). Therefore, it was not ineffective for counsel not to  
11 raise subclaim A(1) on appeal.

12 The entirety of subclaim B lacks merit and is denied.

13 Subclaim A(1)

14 Respondents contend that subclaim A(1) was not properly exhausted and is procedurally  
15 defaulted. (Dkt. 60 at 12.) Petitioner asserts that the Arizona Supreme Court necessarily  
16 reached the merits of A(1) by virtue of its independent sentencing review (Dkts. 71 at 4; 66  
17 at 7-8), or in its review of the related IAC subclaim, B(1) (Dkt. 66 at 26). To the extent  
18 subclaim A(1) was found precluded in state court, Petitioner argues that ruling was not made  
19 pursuant to an adequate and independent state procedural rule. (Dkt. 66 at 26.) The Court  
20 rejects each of Petitioner's contentions.

21 First, the Arizona Supreme Court, through its jurisprudence, has repeatedly stated that  
22 it independently reviews each capital case to determine whether the death sentence is  
23 appropriate. To ensure compliance with Arizona's death penalty statute, the court reviews  
24 the record regarding aggravation and mitigation findings, and then decides independently  
25 whether the death sentence should be imposed. State v. Brewer, 170 Ariz. 486, 493-94, 826  
26 P.2d 783, 790-91 (1992). The Arizona Supreme Court has also said that in conducting its  
27 review, it determines whether a death sentence was imposed under the influence of passion,  
28 prejudice, or any other arbitrary factors. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d

41, 51 (1976), sentence overturned on other grounds, Richmond v. Cardwell, 450 F. Supp. 519 (D. Ariz. 1978). Arguably, such a review rests on both state and federal grounds. See Brewer, 170 Ariz. at 493, 826 P.2d at 790 (finding that statutory duty to review death sentences arises from need to ensure compliance with constitutional safeguards imposed by the Eighth and Fourteenth amendments); State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981) (discussing Gregg v. Georgia, 428 U.S. 153 (1976), and Godfrey v. Georgia, 446 U.S. 420 (1980), and stating that independent review of death penalty is mandated by the U.S. Supreme Court and necessary to ensure against arbitrary and capricious application).

Petitioner references no authority suggesting that the scope of Arizona's review encompasses any and all constitutional error at sentencing, and this Court has found none. In Brewer, the Arizona Supreme Court observed that it has a duty to determine the propriety of the death penalty and that this decision "is guided, above all, by the state's narrowly construed statutes specifying the limited circumstances for which a defendant may be deemed death-eligible." 170 Ariz. at 494, 826 P.2d at 791. The federal constitutional aspect of the court's review is limited to ensuring that imposition of the death sentence rests on permissible grounds. See id.; see also Watson, 129 Ariz. at 63, 628 P.2d at 946. In reviewing the existence of aggravating and mitigating circumstances, the Arizona Supreme Court would have no cause to consider the general constitutionality of Arizona's death penalty scheme. The Ninth Circuit recently held that this type of general claim is not exhausted by Arizona's independent sentencing review. See Moormann, 426 F.3d at 1057-58 (finding that independent sentencing review did not exhaust claim that death penalty is cruel and unusual, or that Arizona death penalty statute is unconstitutionally mandatory, that the death penalty is imposed arbitrarily and capriciously, or that denial of a jury trial as to death sentence was unconstitutional). Therefore, the Court finds that subclaim A(1) was not exhausted by virtue of the supreme court's independent sentencing review.

To the extent Petitioner raised subclaim A(1) as an independent claim in his PCR proceeding, the PCR court found review precluded pursuant to Rule 32.2(a)(3). (Id., Ex. E at 1-2.) In his PR, Petitioner did not seek relief from, or review of, the PCR court's

preclusion determination and affirmatively indicated that he had not sought relief with respect to his challenges to the constitutionality of Arizona's death penalty scheme; he only referred to the merits of those allegations in an attempt to establish that the PCR court erred in denying relief on the merits of the related appellate IAC claim. (Id., Ex. F at 5-6, 7.) Thus, Petitioner did not fairly present subclaim A(1) to the supreme court as an independent claim, and the PCR court's ruling on the associated IAC claim is not sufficient to satisfy the exhaustion requirement.

Petitioner is now precluded by Arizona Rules of Criminal Procedure 32.2(a)(3) and 32.4 from obtaining relief in state court on subclaim A(1). See Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h); Beaty, 303 F.3d at 987 & n.5 (finding no state court remedies and noting that petitioner did not raise any exceptions to Rule 32.2(a)). Further, even if the Court were to construe the PR as having fairly presented allegation A(1), this Court "looks through" the supreme court's summary denial and relies on the PCR court's preclusion ruling as the last reasoned state court ruling. See Ylst, 501 U.S. at 803. As discussed above, preclusion pursuant to Rule 32.2(a)(3) is an adequate and independent state procedural bar. Supra note 4.

In sum, subclaim A(1) is technically exhausted but procedurally defaulted, absent a showing of cause and prejudice or a fundamental miscarriage of justice. Petitioner has asserted neither. Accordingly, subclaim A(1) of Claim 7 is dismissed as procedurally barred.

### **Claims 8 and 9**

Claim 8 alleges that (A) the trial court's failure to instruct the jury on disorderly conduct as a lesser-included offense of aggravated assault and (B) trial and appellate counsel's failure to raise and preserve that issue violated Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments. Claim 9 alleges that (A) the trial court erred by admitting irrelevant victim impact evidence during the guilt phase of Petitioner's trial and (B) appellate counsel failed to raise and preserve that claim in violation of Petitioner's rights under the Sixth and Fourteenth Amendments.

Respondents concede that Petitioner properly exhausted the IAC portion of these claims, subparts B, but argue that the alleged trial court error, subparts A, are not exhausted.

1 (Dkt. 60 at 12-13.) Petitioner counters that the PCR court necessarily reached the merits of  
2 subparts A in resolving the related IAC portions of the claims, and/or that the PCR court did  
3 not find subparts A precluded pursuant to an independent state procedural rule. (Dkt. 66 at  
4 27-28, 29-30.)

5 To the extent Petitioner presented subpart A of Claims 8 and 9 as independent claims  
6 in his PCR proceeding, the PCR court found them precluded under Rule 32.2(a)(3). (Id., Ex.  
7 E at 1-2.) In his PR, Petitioner did not seek relief from, or review of, the PCR court's  
8 preclusion determinations; rather, he indicated he was briefing the substantive claims only  
9 to establish that the PCR court erred in denying relief on the merits of the related IAC claims.  
10 (Id., Ex. F at 5-6, 7.) Thus, Petitioner did not fairly present subpart A of Claims 8 and 9 to  
11 the supreme court as independent claims, and the PCR court's ruling on the associated IAC  
12 claims is not sufficient to satisfy the exhaustion requirement.

13 Petitioner is now precluded by Arizona Rules of Criminal Procedure 32.2(a)(3) and 32.4  
14 from obtaining relief in state court on subpart A of either claim. See Ariz. R. Crim. P.  
15 32.2(b); 32.1(d)-(h); Beaty, 303 F.3d at 987 & n.5 (finding no state court remedies and noting  
16 that petitioner did not raise any exceptions to Rule 32.2(a)). Further, even if the Court were  
17 to construe the PR as having fairly presented the allegations in subparts A, this Court "looks  
18 through" the supreme court's summary denial and relies on the PCR court's preclusion ruling  
19 as the last reasoned state court ruling. See Ylst, 501 U.S. at 803. As discussed above,  
20 preclusion pursuant to Rule 32.2(a)(3) is an independent state procedural bar. Supra note 4.

21 In sum, subpart A of Claims 8 and 9 is technically exhausted but procedurally defaulted,  
22 absent a showing of cause and prejudice or a fundamental miscarriage of justice, neither of  
23 which has been asserted. (Dkt. 66 at 27-28.) Accordingly, subpart A of Claims 8 and 9 are  
24 dismissed as procedurally barred, and subpart B of Claims 8 and 9 will be briefed and  
25 reviewed on the merits.

#### 26 **Claim 10**

27 Claim 10 alleges that trial and appellate counsel failed to raise and preserve challenges  
28 to the prosecutor's improper closing argument, in which he implied that a verdict of not

1 guilty by reason of insanity would result in Petitioner's immediate release. Respondents  
 2 argue that only the appellate IAC aspect of this claim was properly exhausted. (Dkt. 60 at  
 3 13.) In the Traverse, Petitioner concedes the point and does not assert that either cause and  
 4 prejudice or a fundamental miscarriage of justice excuse the default of the trial IAC aspect  
 5 of the claim. (Dkts. 66 at 30; 71 at 2-3.) Therefore, the trial IAC aspect of this claim is  
 6 dismissed as procedurally barred, and the appellate IAC portion of the claim will be briefed  
 7 and reviewed on the merits.

### 8 **Claim 11**

9 Claim 11 alleges that Petitioner will be incompetent to be executed under the Sixth,  
 10 Eighth and Fourteenth Amendments. (Dkt. 55 at 56-57.) Petitioner recognizes, and  
 11 Respondents agree, that this claim is not yet ripe for federal review. (Dkt. 60 at 13-14.)  
 12 Pursuant to Martinez-Villareal v. Stewart, 118 F.3d 628, 634 (9th Cir. 1997), aff'd, 523 U.S.  
 13 637 (1998), a claim of incompetency for execution "must be raised in a first habeas petition,  
 14 whereupon it also must be dismissed as premature due to the automatic stay that issues when  
 15 a first petition is filed." If again presented to the district court once the claim becomes ripe  
 16 for review, it shall not be treated as a second or successive petition. See id. at 643-44.  
 17 Therefore, the Court dismisses Claim 11 without prejudice as premature.

### 18 **CONCLUSION**

19 As discussed herein, the Fifth Amendment aspect of all of Petitioner's claims and the  
 20 Eighth Amendment aspect of Claims 1-4, 9, and 10 are dismissed as not cognizable for  
 21 habeas relief. The following aspects of Petitioner's claims are dismissed as procedurally  
 22 barred: (a) the right to counsel, due process, and equal protection allegations of Claim 1;  
 23 (b) the right to counsel and equal protection allegations of Claim 2; (c) Claims 7A(1), 8A,  
 24 and 9A; and (d) the trial IAC allegation of Claim 10. Claims 3 (to the extent it alleges IAC),  
 25 7A(2) - (5) and 7B are dismissed on the merits. Claim 11 is dismissed without prejudice as  
 26 premature. The balance of Petitioner's remaining claims will be briefed on the merits. The  
 27 Court will address the remaining procedural issues regarding Claims 3 and 4 in a subsequent  
 28 order.

1 Accordingly,

2 **IT IS ORDERED** that Claim 11 is **DISMISSED** without prejudice as premature.

3 **IT IS FURTHER ORDERED** that the Fifth Amendment aspects of all of Petitioner's  
4 claims and the Eighth Amendment aspects of Claims 1-4, 9, and 10 are **DISMISSED** as non-  
5 cognizable for habeas relief.

6 **IT IS FURTHER ORDERED** that Claims 3 (to the extent it alleges IAC), 7A(2)-(5)  
7 and 7B are **DISMISSED WITH PREJUDICE** on the merits.

8 **IT IS FURTHER ORDERED** that the following claims or portions thereof are  
9 **DISMISSED WITH PREJUDICE** as procedurally barred: (a) the right to counsel, due  
10 process, and equal protection allegations of Claim 1; (b) the right to counsel and equal  
11 protection allegations of Claim 2; (c) Claims 7A(1), 8A and 9A; and (d) the trial IAC  
12 allegation of Claim 10.

13 **IT IS FURTHER ORDERED** that, no later than **forty-five (45) days** following entry  
14 of this Order, Petitioner shall file a Memorandum regarding the merits of the following  
15 claims: (a) the Sixth and Fourteenth Amendment confrontation right allegations of Claim  
16 1; (b) the Fourteenth Amendment due process aspect of Claim 2; (c) the Fourteenth  
17 Amendment allegations of Claim 3, and the corresponding appellate IAC allegation as cause;  
18 (d) Claim 4 in entirety, including addressing subpart C as cause to excuse the default of  
19 subparts A and B; (e) Claims 5, 6, 8B and 9B; and (f) the appellate IAC allegations of Claim  
20 10. The Merits Memorandum shall specifically identify and apply appropriate AEDPA  
21 standards of review *to each claim for relief* and shall not simply restate facts and argument  
22 contained in the amended petition. Petitioner shall also identify in the Merits Memorandum:  
23 (1) each claim for which further evidentiary development is sought; (2) the facts or evidence  
24 sought to be discovered, expanded or presented at an evidentiary hearing; (3) why such  
25 evidence was not developed in state court; and (4) why the failure to develop the claim in  
26 state court was not the result of lack of diligence, in accordance with the Supreme Court's  
27 decision in Williams v. Taylor, 529 U.S. 420 (2000).

28 **IT IS FURTHER ORDERED** that no later than **forty-five (45) days** following the

1 filing of Petitioner's Memorandum, Respondents shall file a Response Re: Merits.


2 **IT IS FURTHER ORDERED** that no later than **twenty (20) days** following the filing  
3 of Respondents' Response, Petitioner may file a Reply.

4 **IT IS FURTHER ORDERED** that if, pursuant to LRCiv 7.2(g), Petitioner or  
5 Respondents file a Motion for Reconsideration of this Order, such motion shall be filed  
6 within **fifteen (15) days** of the filing of this Order. The filing and disposition of such motion  
7 does not toll the time for the filing of the merits briefs scheduled under this Order.

8 **IT IS FURTHER ORDERED** that the Clerk of Court forward a copy of this Order to  
9 the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

10 DATED this 6<sup>th</sup> day of June, 2006.

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Roslyn O. Silver  
United States District Judge